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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 1123

HAROLD WEINHART,
Petitioner,
v.
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Harold Weinhart, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above cause on February 5, 1966.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, (not yet reported), is printed as Appendix 1, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1966 (p. 14). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1) and Section 1254 (3).

QUESTIONS PRESENTED

1. Was the Petitioner such a person who was subject to the provisions of the Labor Management Relations Act of 1947, 61 Stat. 136 *et seq.*, as amended, or as cited as the Labor and Management Reporting and Disclosure Act of 1959?

2. Were the comments of the attorney for the Government on the Defendant's (Petitioner's) failure to take the stand and present witnesses on his own behalf made to the jury grounds for reversible error?

3. Was it error for the trial judge to allow the jury to take into the jury-room after two and one-half hours of deliberation the Indictment filed by the Government?

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment of the Federal Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The various constitutional provisions and statutes involved in this case are set forth in Appendix 2, *infra*, p. 14.

STATEMENT

This case involves the trial of Petitioner upon an Indictment, the first count of which charged a conspiracy, between Petitioner and one Louis T. Ralston and diverse persons unknown, to commit an offense against the United States of America, to wit: to violate Section 186 of Title 29, United States Code and that in pursuance thereof defendants did commit certain specified overt acts.

Under the second count, it is averred that on or about July 19, 1963, the Petitioner, Harold Weinhart and the aforesaid Louis T. Ralston did unlawfully, wilfully and knowingly request the payment of an unspecified sum of money from officials of Michigan Chrome in violation of Section 186 (b) of Title 29 and Section 2 (a) of Title 18, United States Code. (1a4a).*

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*This Petition makes reference to the following: Appendix for Appellant, used in the Court below and the Appendix to this Petition which is a part hereof. References to the Appendix for Appellant are designated by "a" following the page number. Reference to the Appendices to this Petition are designated by "App." preceding the page number. References to other materials are specifically descriptive.

Upon the charges so laid, the Jury found Petitioner guilty on both counts (38a).

At the conclusion of the Assistant United States District Attorney's opening statement, counsel for Petitioner moved for a directed verdict of acquittal upon the ground that the necessary elements to bring the Petitioner within the jurisdiction of the Taft-Hartley Act, as amended, were not present (4a-5a), renewing said motion at the close of the Government's case (12a).

The Government, to sustain the burden of proof, relied upon the testimony of four witnesses, the first of whom, Robert J. Huber, President of Michigan Chrome, testified upon cross-examination, that he mentioned that he would contact the Petitioner on the following Monday and give him an answer as to when he could give him an answer; that there was no plan set up as to how this matter was to be handled; that no money whatsoever was paid by him to Petitioner or deposited to his account; that no one else had done so and that it was dropped at the last meeting he had with Petitioner and that the only trouble he had had with the Teamsters Union had occurred six years prior to the time in question (6a-7a).

Mary Solis, an employee of the Union, testified that Petitioner does not work for her union and that she had never before seen him (8a).

Donald L. Bullis, testified, upon cross-examination that he had never before seen the Petitioner; that to his knowledge he was not at the union hall when he saw Mr. Ralston; that Mr. Ralston never mentioned to Petitioner as being in touch with the company and that Mr. Ralston told him that if he wanted a union, he, Ralston, would send a telegram and that Petitioner's name was never mentioned (9a).

Marian Janukaitis, the last of the four witnesses above referred to and an employee of Michigan Chrome, testified, upon cross-examination, that her fellow employees wanted a union because they desired a pension plan; that she had never seen the Petitioner around the plant and that she had never seen him at any time until appearing as a witness at the trial (9a-10a).

The Government having rested, counsel for Petitioner moved for a directed verdict of acquittal based upon the following grounds:

1. For the reasons set forth in the motion made at the close of the Government's opening statement; and
2. That the Government had not sustained the burden of proof.

The Trial Court stating that the motion would be overruled, counsel for Petitioner thereupon moved that in the alterative, since there was not sufficient proof for both counts to go to the jury, that an election or striking of one count be made. The Court overruled both motions, stating that, "It might be thin, but it's enough" (10a-12a).

Counsel for the Government, in his closing argument, commented upon the failure of Petitioner to testify in his own behalf; stated that he had presented no evidence by virtue of his plea of not guilty, since such plea was not made under oath (13a) and that counsel for Petitioner, as an elementary matter, had the right to subpoena witnesses (35a). The Court took counsel's motion under advisement (35a). Prior thereto the Court, in commenting upon the motion made by reason of reference being made to Petitioner's failure to testify, stated: "I think it is rather close, I must confess" (33a).

Three times the Indictment was presented to the Jury and upon being unable to agree, at their request and over counsel's objection, they were permitted to take the Indictment to the jury-room (35a-37a).

Thereafter, counsel filed a motion for a new trial which the Court denied (41a-43a).

REASONS FOR GRANTING THE WRIT

1. Count 1 of the Indictment charges a conspiracy to violate Section 186 of Title 29 U.S.C.—Count 11, the actual commission of sub section (b) and of Section 2((a), Title 18, U.S.C. The one charges a conspiracy, i.e. an agreement to violate the Act, and the other, the actual violation of the Act by the commission of the substantive offense itself.

As was said in *Curtis v. United States,* (CCA 10), 67 F. 2nd and *Lisansky v. United States,* (CCA 4), 31 F. 2nd, 846, the conspiracy to commit the offense alleged is in such close connection with the objective offense as to be inseparable.

In *Gebardi v. United States,* 287 U.S. 112, 77 L. ed. 210, where a man and a woman, not then husband and wife, were convicted under an Indictment charging a conspiracy to transport the woman, from one state to another, in violation of the Mann Act, this Court, in reversing the conviction affirmed by the Court of Appeals, held in part, as follows:

> "The Act does not punish the woman for transporting herself; it contemplates two persons—one to transport and the woman or girl to be transported. Of this class of cases we say that the substantive offense involves the same combination or community of purpose of two persons only one of which is

> prosecuted here as a conspiracy. * * * where it is impossible under any circumstances to commit the substantive offense without co-operative action, the preliminary agreement between the same parties is not an indictable conspiracy either at common law, *Shannon v. Com.*, 14 P. 226, or under the Federal statute."

2. Count One of the Indictment charges a conspiracy between Petitioner, Harold Weinhart, and an alleged Union officer to violate Section 186 of Title 29, United States Code and following a description of the alleged Overt Acts, avers also that the same was in violation of Section 371 of Title 18, United States Code.

Count Two of the Indictment incorporating therein by reference to Count One again charges the commission of the conspiracy and also the commission of the substantive offense set forth in Section 186 (b) of Title 29 and section 2 (a) of Title 18, United States Code.

Section 186(a) Title 29 U.S.C. provides in part, as follows:

> "It shall be unlawful for any employer or association of employers or any any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer, to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value— * * *."

Section 402, Title 29 U.S.C., under the heading "Definitions," subsection (m), reads as follows:

> "'Labor relations consultant' means any person who, for compensation, advises or represents an employer, employer organization or labor organization concerning employee organizing, concerted activities, or collective bargaining activities."

The Indictment in the case at bar makes no mention of the statutory definitions above set forth. It merely avers that Harold Weinhart, a defendant, * * * *"represented himself to officers of Michigan Chrome as a labor relations advisor."* It does not aver in the language of the statute the class designated therein, to which he allegedly belonged. In order that a person might be subject to the penal provisions of the Act, he must perforce have been, not a mere pretender, but in the language thereof, actually a labor relations expert, adviser or consultant to an employer, who for compensation represents an employer, employer organization or labor organization. Not only does the Indictment fail to aver that he is a member of the class liable to prosecution, as therein set forth, but it is silent as to whom he "represented himself" as a labor relations adviser.

In *Farnsworth v. Zerbst* (1938); CCA 5th. 98 F. 2nd 541, and *State v. Davis* (1932) 203 N.C. 13, cert. den. 287 U.S. 649, 77 L. ed. 561, it was held that it must appear that one or more of the conspirators had the capacity to commit an offense, which the defendant alone is incapable of committing, to sustain a conviction for conspiracy to violate such act.

> "Where an act passed by the legislature embodies a definition, it is binding on the courts. (*Collins v. Texas,* 223 U.S. 288, 56 L. ed. 439.) Where a statute contains its own definition of a term used therein, the term may not be given the meaning in which it is employed in another statute, although the two may be in *pari materia.* (*Davison v. F. W. Woolworth Co.,* 186 Ga. 663, 198 S.E. 738, 107 ALR 1306.)"
>
> *50 Am. Jur.* "Statutes", Sec. 262.

In *People v. Meisner* (1913), 178 Mich. 115, 117, the Supreme Court of Michigan, recognizing the doctrine of *Ejusdem Generis*, held as follows:

> "Whenever an ordinance or statute fixes a classification and creates an offense which can be committed only by persons within the class, *it is necessary, not only to allege, but to prove that the accused belongs to* the class described. * * *"

In *State v. Kreuger*, 134 N. 263, the Supreme Court of Missouri said:

> "* * * Where a particular class is spoken of and general words follow, the class first mentioned is to be taken as the most comprehensive and the general rules treated as referring to matters *ejusdem generis* with such class.
>
> The specific words of the statute are 'if any judge or clerk of any election authorized by law or any other persons' must be construed to mean other persons legally connected with such election, as officers or otherwise. * * *"

See, Id: *Maiatico v. U.S.*, 302 F. 2nd, 880 and
Bumpus v. U.S., 325 F. 2nd 264.

3. The jury returned a verdict of guilty on both counts. By this, was it meant that the lone defendant on trial was convicted of the conspiracy charge contained in Count I, reincorporated in Count II, and also of the substantive offense set forth in Count Two? We submit that since Petitioner was not averred to come within the members of the class as set forth in the statutory definition, and that there was no proof that he did, that the conviction should not be permitted to stand.

In *United States v. Fabrizio,* D.C. Del. 1961, 193 F. Supp. 446, cited in the footnotes to Sec. 186 Title 29 USC., it was held that the prosecution has the burden to overcome evidence which tends to bring the defendant within exception of this section under which he is being prosecuted.

In *United Statess v. Bathgate,* 246 U.S. 220, 62 L. ed 676 and *United States v. Gradwell,* 243 U.S. 476, 61 L. ed 857, this Court held that a conspiracy to bribe voters at a general election within a state where Presidential Electors and Members of Congress are to be chosen, is not punishable as a conspiracy "to commit any offense against the United States or to defraud the United States in any manner whatsoever or for any purpose."

4. The 6th cir., amongst other things affirmed the denial of the motion for a new trial for some of the reasons already above discussed but also held that the verdict was not contrary to the law and evidence; that the court did not commit reversible error in allowing the Government's attorney, in his closing argument to state to the jury, and to stress the fact that defendant did not take the stand, or produce witnesses in his own behalf; that his plea of not guilty was not evidence of his innocence, because not made under oath, and that the trial court did not commit reversible error in allowing the jury, long after they had begun their deliberations, to take the Indictment to the jury-room with them.

That the Government failed to sustain the burden of proof is readily to be seen by perusing the appendix setting forth the testimony of the Government's four principal witnesses. Upon motions for aequital, etc., being made, the Trial Court as to the evidence conceded, that *"It might be thin but it's enough."* (App. 12a). No authority need be cited in support of the fundamental principle

of American Jurisprudence, that no man's liberty should be forfeited by reason of testimony and/or *evidence so "thin"* that the verdict must be made to depend, on conjecture, guess, inferences, speculation, et cetera, et cetera.

Our Bill of Rights which provides that no person accused of crime shall be forced to be a witness against himself, or to produce witnesses to prove his innocence, most prosecutors with meticulous care, not only avoid making mention of, but join counsel in urging that it must not under any circumstances whatsoever, be considered in evidence in arriving at a verdict of guilt.

In *Eddie Dean Griffin, Petitioner, v. State of California,* (1965), 85 S. Ct. 1229, this Court, speaking through Mr. Justice Douglas, reversed the jury's verdict of murder in the first degree for the reason that the Trial Court, in its instructions to the jury, commented upon the failure of Petitioner to take the witness stand in his own behalf, although a California statute permitted the Court so to do, and held as follows:

> "We said in *Malloy v. Hogan, supra,* p. 11, that 'the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.' We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the federal government and its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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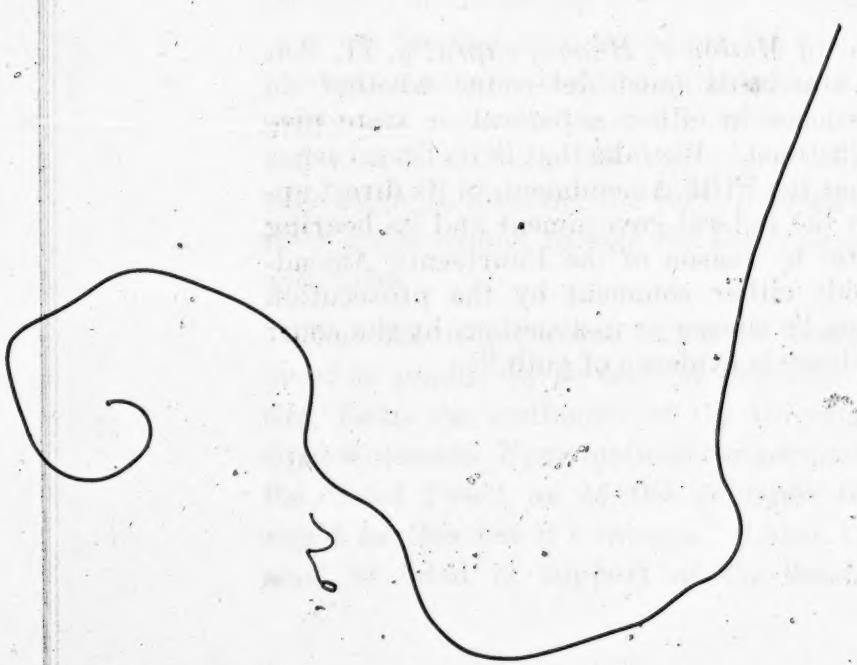

APPENDIX 1

OPINION OF THE COURT OF APPEALS

No. 16,411

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
HAROLD WEINHART,
Defendant-Appellant.

ORDER

(Filed February 5, 1966)

Before WEICK, Chief Judge, O'SULLIVAN, Circuit Judge, and CECIL, Senior Circuit Judge.

Upon consideration of the appeal, we find that there was substantial evidence in the record to support the judgment of conviction in this case, and that no error of a prejudicial nature occurred at the trial.

It is therefore Ordered that the judgment of conviction be and it is hereby affirmed.

Entered by order of the Court.

/s/ Carl W. Reuss,
Clerk.

APPENDIX 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 186(a), Title 29, U.S.C. provides:

> "It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant of an employer or who acts in the interest of an employer, to pay, lend, or deliver, or agree to pay, lend or deliver, or agree to pay, lend or deliver, any money or other thing of value—

"(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

"(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are engaged in an industry affecting commerce; or

"(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group of employees, directly or indirectly, to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

"(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

"(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

Section 402, Title 29, U.S.C., under the heading, "Definitions" reads as follows:

(m) "Labor relations consultant" means any person who, for compensation, advises or represents an employer, employer organization, or labor organiza-

tion concerning employees organizing, concerted activities, or collective bargaining activities."

Section 2 (a), Title 18, U.S.C. provides that:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Section 371, Title 18, U.S.C. reads as follows:

"If two or more persons conspire, either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined * * *."